No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner, Cross-Respondent,

v.

SAC AND FOX NATION,

Respondent, Cross-Petitioner,

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF AMICUS CURIAE THE CHOCTAW NATION OF OKLAHOMA IN SUPPORT OF RESPONDENT

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This brief amicus curiae is filed, in support of Respondent, by the Choctaw Nation of Oklahoma, with the consent of both parties.

INTEREST OF THE AMICUS CURIAE

The amicus, Choctaw Nation of Oklahoma, is a federally recognized Indian tribe which occupies several thousand acres of restricted allotments and federally owned tribal trust lands situated in the southeast portion of Oklahoma. It exercises a broad range of self-governing powers, including civil and criminal jurisdiction, over these lands. It has more than 50,000 tribal members, many of whom reside and are employed on Indian country. The State of Oklahoma is presently taxing the income of tribal members earned on said lands.

The Oklahoma Tax Commission, historically the most aggressive state taxing agency in the country toward Indians, has urged this Court to treat Oklahoma Indians and Indian country differently from Indian counterparts in the rest of the country. It impliedly makes the often rejected argument that the terms reservation and Indian country are not synonymous, and that since Oklahoma Indian country is somehow different from that in the other states, the federal preemption/infringement test should be applied. Finally, the Tax Commission contends that the application of its taxes to transactions between the tribe and its members on Indian country neither infringes on tribal self-government nor is preempted by federal law. Yet, there is an absence of any showing why

either of these two barriers to state jurisdiction should not apply.

Since the members of the Choctaw Nation will be impacted by the Tax Commission's far-reaching and novel theories, amicus participates herein in support of the decision by the Court of Appeals below.

Summary of Argument

Reduced to its essentials, the Oklahoma Tax Commission's position in this case is that the terms reservation and Indian Country have a different meaning in Oklahoma than in other states; that Oklahoma Indian tribes are not "reservation tribes" but rather are "assimilated tribes"; that this then requires the preemption/infringement inquiry as to whether the State may apply its tax laws to transactions between the tribe and its employees on this new and different kind of Indian Country; that the result of the inquiry is that the Indians lose and the State wins. Because of this anomalous status, and because there are no reservations in Oklahoma, the State contends, Oklahoma tribes, in their relationship with their members, are subject to the full array of the State's taxing jurisdiction. Sustaining this position would result in the necessary finding that those Indian tribes and their members would not have the usual attributes of sovereignty and self-government as possessed by tribes in other states.

The Tax Commission is asking this Court to adopt positions that are contrary to some of the most well-established principles of federal Indian law. If accepted by this Court, there would then be two bodies of Indian

law in this country; federal Indian law which would apply in 49 states and Oklahoma Indian Law, which would apply in one. No such result is warranted in this case. A clear body of precedent from this Court and the Tenth Circuit Court of Appeals has established that the lands held in trust by the United States government for Indian tribes in Oklahoma are "reservations" and therefore "Indian Country" within the meaning of 18 U.S.C. §1511(a). In addition, the Tax Commission has advanced no persuasive argument as to why the preemption/infringement balancing test should be applied to the relations of tribal governments or their business associates and tribal members on Indian Country.

ARGUMENT

I. Whether The Original Sac And Fox Reservation Has Been Diminished Is Irrelevant To The Issue Of Whether The State May Apply Its Tax Laws To The Tribe And Its Members, On Their Remaining Indian Country

This Court does not have to decide whether the original Sac and Fox reservation in Oklahoma has been disestablished or whether its boundaries have been abolished. Whether conduct of Indians has occurred on "Indian country" is now the benchmark for allocation of federal, tribal, and state civil and criminal jurisdiction. *Oklahoma Tax Commission v. Citizen Band Potawatomi*, 111 S.Ct. 905 (1991); *California v. Cabazon Band of Indians*, 107 S.Ct. 1083, 1087 & N.5 (1987); *DeCoteau v. District County Court*, 420 U.S. 425, 427-428 & N.2 (1971); *Indian Country, U.S.A. Inc. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) Cert.

Den. sub. nom. *Oklahoma Tax Commission v. Muscogee (Creek) Nation*, 108 S.Ct. 2870 (1988). See also F. Cohn, *Handbook of Federal Indian Law* 5-8 (1942). Congress has defined "Indian country" for purposes of determining federal criminal jurisdiction in 18 U.S.C. §1511(a) (1982) to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . " The Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. §1903(10) provides:

> "Reservation means Indian country as defined in section 1151 of title 18 and any lands, not covered under such action, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;"

On September 26, 1988, the Congress passed Senate bill 555, Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq. Section 2703(4)(b) of the Act defines "Indian lands" for tribal and federal jurisdictional purposes as:

> "Any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual . . . and over which an Indian tribe exercises governmental power."

This Court has designated lands as "Indian Country" where title was held in a variety of ways. *United States v. Pelican*, 232 U.S. 442, 449 (1914); *United States v. McGowan*, 302 U.S. 535, 538-539 (1938); *United States v. Chavez*, 290 U.S. 357, 364 (1933); *United States v. John*, 437 U.S. 634, 649 (1978). The principal test applied by the courts is found in *Pelican* at 439, i.e. tribally-owned lands "devoted to

Indian occupancy . . . validly set apart for the use of Indians". This includes lands held in trust for a tribe by the United States. *John* at 649. This is also the test applied in at least four Circuits. *United States v. Sohappy*, 770 F.2d 816, 622-23 (9th Cir. 1985); *Langly v. Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985); *United States v. Agure*, 801 F.2d 336 (8th Cir. 1986); *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665, 667-668 (10th Cir. 1980); See also *State of Washington v. Sohappy*, 757 P.2d 509, 511 (Wash. 1988); and, *State ex. rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 639 (Okl. 1985).

The Petitioner apparently made the same argument to the Circuit Court in *Indian Country, U.S.A.*, supra, that it does here, i.e. the Creek Nation reservation had been disestablished. The Court there said at 975 N.3:

> "The State seems to believe that the Indian country status of the Mackey site rests on whether the exterior boundaries of the 1866 Creek reservation have been disestablished. It does not . . . *Tribal lands, trust lands, and certain allotted lands generally remain Indian country despite disestablishment*. (Emphasis supplied.) See, e.g., *Solem*, 465 U.S. at 467 n.8, 104 S.Ct. at 1164 n.8; *DeCoteau*, 420 U.S. at 428, 95 S.Ct. at 1085."

The terms "reservation" and "Indian country" are used interchangeably by the congress and the courts. The primary meaning of both terms is to describe "federally-protected Indian tribal lands". Cohen's Handbook of Federal Indian Law (R. Strickland Ed. 1982) at 35 n. 66. Thus, the terms "Indian country" and "reservation" have come to mean "those lands which congress has set apart for

tribal and federal jurisdiction". *Indian Country, U.S.A.* at 973. It should be noted that the Oklahoma Supreme Court has also recognized the importance of this classification:

> "The touchstone for allocating authority among the various governments has been the concept of 'Indian country' a legal term delineating the territorial boundaries of federal, state, and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian country have been matters of federal and tribal concern. Outside Indian country, state jurisdiction has obtained."

Ahboah v. Housing Authority of the Kiowa Tribe, 660 P.2d 625, 627 (Okl. 1983). See also *State v. Burnett*, 671 P.2d 1163 (Okl. Cr. 1983).

Finally, it has been less than two years since this Court again rejected Petitioner's argument on this point. In *Citizen Band Potawatomi*, the Court, speaking through Chief Justice Rehnquist, said that no "precedent of this Court has ever drawn the distinctions between tribal trust land and reservations that Oklahoma urges". Citing *John*, supra, the Court said "we stated that the test for determining whether that land is denominated 'trust land' or 'reservation'. Rather, we ask whether the area has been 'validly set apart for use of the Indian as such, under the superintendence of the Government'". Citing *John* at 648-649.

Petitioner cites to *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) as the basis for its proposition that Indian country is not the same as a reservation. *Bracker* does not support the State's argument. The status of tribal territory was not at issue there and, contrary to

this case, the state in *Bracker* was trying to apply its taxes to non-tribal member activities.

Notwithstanding Petitioner's persistence in urging this oft-rejected and unpersuasive argument, there is nothing in this case that merits its acceptance now.

II. The Preemption/Infringement Analysis Does Not Apply To The Conduct Of The Tribal Government And Its Members On Indian Country

Both the Petitioner and Amicus, United States, urge the Court to apply the preemption/infringement analysis to activities of Indians on Indian country for the first time in this case. The reason the Court has not applied these barriers is because there is a per se rule against taxation of Indian tribes and their members in their relationship with the tribe absent congressional consent. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, f/n 17 (1987) the Court said:

> "In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule.
>
> * * *
>
> We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates we have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest is correspondingly weak . . . "

In *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765-766 (1985) the Court citing the rule from *The Kansas*

Indians, 5 Wall 737, 18 L.Ed. 6 (1867) said regarding the criteria looked to for exemption from state taxation was:

> "[i]f the tribal organization . . . is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' . . . separated from the jurisdiction of [the State], and to be governed exclusively by the government of the Union."

The Court then said:

> "In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the court consistently has held that it will find the Indians' exemption from state taxes only when Congress has made its intention to do so unmistakenly clear."

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), as Petitioner does here, Arizona urged this Court to apply the test in *Williams v. Lee*, 358 U.S. 217 (1959). The Court said:

> " . . . we reject the suggestion that the *Williams* test was meant to apply in this situation. It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. Id. at 179.

The Tax Commission's argument was again rejected in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-476 (1976). The Court in *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980) said it was "quite clear after Moe and McClanahan that the sales tax could

not be applied to . . . purchases by tribal members." Id. at 160. See also *Citizen Band*, supra.

The Tax Commission also argues that application of its income and motor vehicle taxes to tribal members is permissible because the State provides services, roads, schools, etc. to the public in general which includes Indians. Again, this argument meets resistance from *McClanahan and Moe* where the Court expressly rejected the assimilationist theory to tax the tribal members where they continued to maintain their tribal relationship. In *Moe* the Court said:

> "Noting this Court's rejection of a substantially identical argument in *McClanahan*, see 411 U.S. at 173, and n. 12, 36 L.Ed.2d 129, 93 S.Ct.1257, and the fact that the Tribe, like the Navajos, had not abandoned it tribal organization, the District Court could not accept the State's proposition that the tribal members 'are now so completely integrated with the non-Indians . . . that there is no longer any reason to accord them different treatment than other citizens,' 392 F.Supp. at 1315. In view of the District Court's findings, we agree that there is no basis for distinguishing *McClanahan* on this ground." 425 U.S. at 476.

The Tax Commission has not asserted that the Sac and Fox Nation has "abandoned it tribal organization" nor is there any evidence that its members do not maintain their relationship with that organization so as to accord them any different treatment than those tribal members in *McClanahan* and *Moe*.

CONCLUSION

Amicus respectfully prays the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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